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Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

Re: WCB Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

On Thursday, June 17, 2004, the undersigned, together with Richard Metzger, Vice President – Regulatory and Public Policy, Focal Communications, met with Scott Bergmann of the Office of Commissioner Jonathan Adelstein to discuss the Commission's so-called Pick and Choose NPRM. ALTS raised the following concerns regarding the Commission's proposal to reverse its prior interpretation of section 252(I) of the Act:

(1) Litigation risk. The Commission has, since 1996, consistently concluded that the pick and choose provisions of section 252(I) of the Act permit requesting carriers to opt-in to specific provisions of interconnection agreements, rather than forcing them to opt-in to an entire agreement. The legislative history of the 1996 Act supports this interpretation, and the Supreme Court is *Iowa Utilities Board* held that this interpretation is the most logically correct reading of the statute. Because the statute is not ambiguous, and because the Supreme Court has already held that the FCC's prior interpretation of section 252(I) was the most correct possible reading of the statute, the Commission would not be entitled to *Chevron* deference should it decide to reverse itself. Rather, the Commission would face enormous litigation risk and would embroil the industry is even greater turmoil should it decide to open up the interconnection agreement negotation process into great turmoil.
(2) The underlying premise of the Commission's pick and choose NPRM was that Mpower, a New York-based CLEC, had made a convincing argument to the Commission that innovative commercial arrangements were deterred because of the application of pick and choose rules to interconnection agreements. Not only

is that premise questionable, but more importantly, its original proponent, Mpower, has withdrawn its petition, citing its belief that the pick and choose rules should remain in force. The entire factual underpinning for the Commission's NPRM is thus in question, giving rise to further litigation risk

(3) The Commission will impose enormous burdens on state commissions, who will be forced to arbitrate virtually all issues on all interconnection agreements. In the absence of pick and choose capabilities, competitive carriers will be forced to arbitrate every single IA issue, even those that have already been arbitrated by state commissions, because such carriers will be unable to opt-in to any specific IA provisions that have already been adopted. This imposes an enormous and wasteful burden on the state commissions, who will see their volume of arbitration work skyrocket by virtue of this FCC mandate.

(4) Incumbent carriers will be free to strike beneficial deals with their own CLEC affiliates (in the case of SBC and Verizon) or similar related entities, and nonaffiliated CLECs will be unable to opt-in to the favorable provisions of those arrangements without subscribing to onerous terms and conditions that the ILEC, by virtue of its cozy relationship with its affiliate, can include as poison pill provisions to prevent CLEC access.

(5) The FCC's theory, outlined in its NPRM, that ILECs and CLECs have incentive to negotiate more innovative agreements in the absence of pick and choose, is a false premise. Indeed, the Commission has already structured its pick and choose rules so as to protect innovative contractual arrangements. The Commission's rules require requesting carriers seeking to opt-in to existing interconnection agreements to take all substantially related terms and conditions together with the terms and conditions sought via opt-in. As such, any innovative, quid pro quo type negotiations between ILEC and CLEC that result in IA terms must be taken by other requesting carriers *in toto* and not as piece-parts. The existing pick and choose rules already protect against the type of hypothetical CLEC opt-in behavior that the ILECs claim can only be addressed through modifications to those rules.

(6) The ILECs claim to know what is good for the CLECs better than the CLECs do themselves. Those CLECs who contend that their ability to secure innovative IA provisions with ILECs is hampered by the current pick and choose rules are small in number, and the Commission should obviously examine the merits of their claims. But so long as the majority of CLECs oppose the types of modifications countenanced by the Commission's NPRM, it is impossible for the Commission to conclude, based on the record before it, that any party other than the ILECs will benefit from elimination of the pick and choose rules.

(7) Finally, the Commission will create a class of preferred CLECs – those with market power and the ability to leverage negotiations with the ILECs – if it decides to modify the pick and choose rules. ALTS member companies rely on the pick and choose provisions of the Act out of necessity – ILECs are simply unwilling to enter into fair agreements. If the larger companies do not oppose the Commission's modifications to the pick and choose rules, and the smaller companies do oppose such changes, the Commission should recognize the

obvious incongruity in the record before it, and should maintain its existing interpretation of the statute.

Respectfully submitted,

/s / Jason Oxman

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